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No. _____

In the Supreme Court of the United States

October Term, 1988

ALBERT J. FERENS and
MARGARET L. FERENS, his wife,
Petitioners,

vs.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a district court to which a case has been transferred pursuant to 28 U.S.C. §1404(a) is obligated to apply the state law that would have been applied if there had been no transfer where the transfer is from a court having proper venue and jurisdiction and the transfer has occurred as the result of an unopposed motion by the plaintiff.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Albert J. Ferens and Margaret L. Ferens, his wife, respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on November 25, 1988.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit issued November 25, 1988, upon the rendering of the Judgment sought to be reviewed, is reported at 862 F.2d 31 and appears herein as Appendix A at page A-1. The Order of this Court entered on June 27, 1988, vacating the prior Judgment of the Third Circuit and remanding the case to the Third Circuit for further consideration is reported at ___ U.S. ___, 108 S.Ct. 2862 and appears herein as Appendix B at page A-17. The prior Opinion of the Third Circuit dated May 28, 1987, is reported at 819 F.2d 423 and appears herein as Appendix C at page A-18. The Opinion of the United States District Court for the Western District of Pennsylvania is reported at 639 F. Supp. 1484 and appears herein as Appendix D at page A-34.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on November 25, 1988. The Order of the United States Court of Appeals for the Third Circuit denying the Petitioners' timely Petition For Rehearing And For Rehearing En Banc was entered on January 5, 1989. This petition for a writ of certiorari is being filed within ninety (90) days of the denial of Petitioners' Petition For Rehearing And For Rehearing En Banc. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Miss. Code Ann. §15-1-49 (1972) provides:

> All actions for which no period of limitations is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

42 Pa. C.S.A. §5524(2) (Purdon 1981) provides:

> The following actions and proceedings must be commenced within two years:
>
> • • • •
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

STATEMENT OF THE CASE

Petitioners, Albert J. Ferens and Margaret L. Ferens, are residents of Pennsylvania. In July of 1981, Mr. Ferens purchased a John Deere #6620 Combine in Uniontown, Pennsylvania, for use on his farm. The combine had been manufactured by Respondent, John Deere Company, a/k/a Deere & Company[1], a Delaware corporation with its principal place of business in Illinois. In addition to doing business in Pennsylvania, Respondent was also engaged in business in Mississippi, where it was registered with the Secretary of State and maintained a local registered agent.

On July 5, 1982, Mr. Ferens was injured in Pennsylvania while cleaning his combine. His right hand became caught in the rotating auger and was severed above the wrist.

In July of 1985 the Petitioners initiated two lawsuits against the Respondent. One lawsuit was filed in the United States District Court for the Western District of Pennsylvania alleging breaches of express and implied warranties of merchantability and fitness for use (hereinafter "the Warranty Action"), for which the applicable Pennsylvania statute of limitations was four years. *See* 13 Pa. C.S.A. §2725 (Purdon 1984) and 42 Pa. C.S.A. §5525 (Purdon 1981). The other lawsuit was filed in the United States District Court for the Southern District of Mississippi alleging negligence and strict liability in tort (hereinafter "the Tort Action"), for which the applicable Mississippi statute of limitations was six years. *See* Miss. Code Ann. §15-1-49 (1972). Federal court subject matter jurisdiction

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[1]The names of all the parties to the proceedings in the Court of Appeals are contained in the caption of the case in this Court.

for both lawsuits was based upon diversity of citizenship pursuant to 28 U.S.C. §1332.

With respect to the Tort Action, the Respondent did not object to either venue or the exercise of in personam jurisdiction over it by a Mississippi court. Instead, the Respondent filed an answer denying liability and raising various affirmative defenses.

Thereafter, on or about October 2, 1985, the Petitioners moved to transfer the Tort Action to the Western District of Pennsylvania pursuant to 28 U.S.C. §1404(a). The Respondent did not oppose the transfer; and on November 8, 1985, the motion was granted.

In the Western District of Pennsylvania the Tort Action and the Warranty Action were consolidated for all purposes. On or about February 20, 1986, the Respondent filed a motion for summary judgment as to all claims in both lawsuits, asserting that the claims raised in the Tort Action were barred by Pennsylvania's two-year statute of limitations applicable to negligence and strict liability causes of action. *See* 42 Pa. C.S.A. §5524(2) (Purdon 1981). The District Court agreed and granted summary judgment as to the Tort Action claims only. Final judgment was entered as to these claims pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.[2]

The Petitioners appealed to the United States Court of Appeals for the Third Circuit. The Third Circuit initially affirmed the District Court in a 2-1 panel decision which concluded that the United States Constitution required the application of Pennsylvania's statute of limitations no matter where the case was brought. *Ferens v. Deere & Co.*,

[2]The breach of warranty claims in the Warranty Action were stayed pending the outcome of the Petitioners' appeal.

819 F.2d 423 (3rd Cir. 1987), *vacated and remanded*, ___ U.S. ___, 108 S.Ct. 2862 (1988). However, this Court granted certiorari and vacated and remanded in light of its Opinion in *Sun Oil Co. v. Wortman*, ___U.S. ___, 108 S.Ct. 2117 (1988). *Ferens v. Deere & Co.*, ___ U.S. ___, 108 S.Ct. 2862 (1988). On remand, the Third Circuit again affirmed the District Court in a 2-1 panel decision. *Ferens v. Deere & Co.*, 862 F.2d 31 (3rd Cir. 1988). In its Opinion on remand the Court concluded that Pennsylvania's two-year statute of limitations was properly applied to bar the Petitioners' Tort Action because the Petitioners had transferred the case to Pennsylvania. The Petitioners thereafter filed a timely motion for rehearing and for rehearing en banc which was denied on January 5, 1989. Petitioners now seek the issuance of a writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Third Circuit Holding That The Transferee District Court Is Not Obligated To Apply The Law Of The Transferor State When The Plaintiff Is The Moving Party Is In Conflict With This Court's Reasoning In *Van Dusen v. Barrack*

The critical issue in this case is whether the District Court in Pennsylvania was obligated to apply the state law that would have been applied if there had been no transfer and the case had been tried in the Southern District of Mississippi. It is undisputed that had the Tort Action been tried in the Southern District of Mississippi, the federal court there would have applied Mississippi's statute of limitations, Miss. Code Ann. §15-1-49 (1972); and any motion for summary judgment by the Respondent based upon a statute of limitations argument would have been denied. *See Ferens v. Deere Co.*, 862 F.2d 31, 34 (3rd Cir. 1988).[1]Accordingly, the Pennsylvania District Court's decision to apply the law of the transferee state, rather than the law of the transferor state, was fatal to the Petitioners'

[1]Mississippi treats its statute of limitations as procedural for choice of law purposes and applies it to actions brought in Mississippi even though they are otherwise governed by the substantive law of another state. *See Williams v. Taylor Machinery, Inc.*, 529 So.2d 606, 609 (Miss. 1988); *Shewbrooks v. A.C. and S., Inc.*, 529 So.2d 557, 566 (Miss. 1988); *Flick v. Cochran*, 316 So.2d 242, 246 (Miss. 1975); *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 665-666, 131 So. 84, 88 (1930). *See also King v. Ohaeri, Inc.*, 861 F.2d 438, 441 (5th Cir. 1988); *Cowan v. Ford Motor Co.*, 719 F.2d 785, 786 (5th Cir 1983). In *Sun Oil Co. v. Wortman*, ___U.S. ___, 108 S.Ct. 2117, 2121 (1988), this Court recently upheld the constitutionality of such a practice. Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496 (1941), the federal court in Mississippi would have been required to apply the choice-of-law rule of Mississippi in this diversity action, and hence to apply Mississippi's six-year statute of limitations. *See King v. Ohaeri*, 861 F.2d at 441.

Tort Action. The District Court's decision, subsequently affirmed by the Third Circuit, is inconsistent with this Court's reasoning in *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

In *Van Dusen* the defendants sought to transfer to the District of Massachusetts forty wrongful death actions brought in the Eastern District of Pennsylvania by the personal representatives of certain victims of an airline accident which had occurred in Massachusetts. In interpreting the "interest of justice" portion of 28 U.S.C. §1404(a), this Court was required to determine which state law would apply if a transfer were to occur. After a careful analysis, this Court stated:

> We believe, therefore, that both the history and purposes of §1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms. [footnote omitted]

Van Dusen v. Barrack, 376 U.S. at 636-637. Because Section 1404(a) deals only with the placement of litigation, and not with the law to be applied, the Court concluded that in cases such as the one before it,

> . . . the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under §1404(a) generally should be, with respect to state law, but a change of courtrooms. [footnote omitted]

Id., 376 U.S. at 639. *See also Cowan v. Ford Motor Co.*, 713 F.2d 100, 104 n.6 (5th Cir. 1983) (if case is transferred

on defendant's motion, Mississippi statute of limitations would still apply); *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790, 792-793 (10th Cir. 1979) (Mississippi statute of limitations would be applied in case transferred to Kansas). *Cf. Stewart Organization, Inc. v. Ricoh Corp.*, ___ U.S. ___, 108 S.Ct. 2239, 2245 (1988) (a transfer pursuant to §1404(a) does not carry with it a change in the applicable law).

In refusing to apply the state law of the transferor state, as was required in *Van Dusen*, the Third Circuit emphasized that *Van Dusen* involved a transfer sought by the defendants and noted that this Court limited its holding in *Van Dusen* to defendant-initiated transfers. *See Ferens v. Deere & Co.*, 862 F.2d at 34-35. While it is true that this Court reserved judgment on whether the same considerations would govern a plaintiff-initiated transfer, *see Van Dusen v. Barrack*, 376 U.S. at 640, the Court's reasoning and analysis are equally compelling in requiring the application of the transferor state's law regardless of which party is seeking the transfer.

The purpose of Section 1404(a) is to allow federal civil suits to be transferred, in the interest of justice, to the most convenient forum.

> Section 1404(a) reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice. [footnote omitted]

Van Dusen v. Barrack, 376 U.S. at 616.

> The idea behind §1404(a) is that where a "civil action" to vindicate a wrong—however brought in a court—presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court.

Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26 (1960), quoted with approval in *Van Dusen v. Barrack*, 376 U.S. at 622.

This remedial purpose is available to a plaintiff as well as a defendant. *See Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 219 (7th Cir. 1986); *Philip Carey Manufacturing Co. v. Taylor*, 286 F.2d 782, 784 (6th Cir.), *cert. denied*, 366 U.S. 948 (1961); 1 J. Moore, Moore's Federal Practice, ¶0.145[4.-2] (2d ed. 1988). Nothing in Section 1404(a) provides for a change of the applicable law when the case is transferred by a plaintiff rather than a defendant. The section simply provides for a change of venue "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. §1404(a).

> There is nothing . . . in the language or policy of §1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue.

Van Dusen v. Barrack, 376 U.S. at 633-634.

> [The] legislative background [of §1404(a)] supports the view that §1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court. The legislative history of §1404(a) certainly does not justify the rather startling conclusion

that one might "get a change of law as a bonus for a change of venue." [footnote omitted]

Id., 376 U.S. at 635-636.

In the present case the Petitioners selected the Southern District of Mississippi as their forum for the Tort Action, thereby obtaining the state-law advantage of Mississippi's six-year statute of limitations. There is no question but that the Southern District of Mississippi was an appropriate forum for the Tort Action.[4] The subsequent transfer of the Tort Action to the Western District of Pennsylvania pursuant to the Petitioners' unopposed motion to

[4]The Respondent never challenged either venue or the exercise of in personam jurisdiction over it by the District Court in Mississippi; and, indeed, any such challenge would clearly have been unsuccessful. Venue over a corporation is appropriate in any judicial district in which the corporation is licensed to do business or is doing business. *See* 28 U.S.C. §1391. In its answer in the Tort Action, the Respondent admitted that it was doing business in Mississippi, was registered with the Secretary of State of Mississippi, and maintained a local registered agent in Jackson, Mississippi. Mississippi law at the time provided that a foreign corporation doing business in Mississippi was subject to suit in Mississippi to the same extent that Mississippi corporations were, regardless of whether the cause of action accrued in Mississippi or not. *See* Miss. Code Ann. §79-1-27 (1972) (repealed effective January 1, 1988). *See also* Miss. Code Ann. §79-3-229 (1972) (repealed effective January 1, 1988). In *S.& W. Construction Co. v. Douglas*, 244 Miss. 498, 506, 142 So.2d 33, 34 (1962) the Mississippi Supreme Court held that under Mississippi law, a Mississippi state court had jurisdiction to hear a case involving a nonresident plaintiff injured in another state suing a foreign corporation which, however, had qualified to do business in Mississippi and had appointed a resident agent for service of process. *See also Williams v. Taylor Machinery, Inc.*, 529 So.2d at 608-609; *Shewbrooks v. A.C. and S., Inc.*, 529 So.2d at 559; *Poole v. Mississippi Publishers Corp.*, 208 Miss. 364, 380, 44 So.2d 467, 473 (1950); *Cowan v. Ford Motor Co.*, 694 F.2d 104, 105-106 (5th Cir. 1982); *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d at 793.

transfer[5] cannot be used by the Respondent to defeat the advantages accruing to the Petitioners from their proper exercise of the privilege of selecting a forum. No change of law can result from the change of venue. To hold otherwise, as the Third Circuit did, is to ignore this Court's admonition that the federal courts should "ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." *Van Dusen v. Barrack*, 376 U.S. at 638.

The Petitioners' Tort Action would not have been barred by the statute of limitations in the courts of Mississippi where it was filed. The Respondent cannot be permitted to utilize the transfer to Pennsylvania, which was

[5]There is no question but that the Tort Action met the statutory requirements for a transfer pursuant to 28 U.S.C. §1404(a) because the transfer was clearly for the convenience of the parties and witnesses and in the interest of justice. As the affidavit accompanying the Petitioners' motion for a change of venue demonstrated, all witnesses with any knowledge of the accident or injuries resided in the Western District of Pennsylvania and all documents relating to the injuries were also located there. The Respondent filed no counter affidavit claiming any inconvenience or prejudice from a transfer to Pennsylvania. In fact, the transfer also convenienced the Respondent because both parties would be able to reduce their legal expenses by consolidating the Tort Action and the Warranty Action which were based on essentially one set of facts. The "interest of justice" component of a Section 1404(a) transfer analysis relates to the efficient administration of the court system. *Coffey v. Van Dorn Iron Works*, 796 F.2d at 221. In the present case the ability to consolidate the two lawsuits and to have the case tried by a federal judge familiar with the applicable substantive law of Pennsylvania also favored transferring the case to Pennsylvania. Cf. *Van Dusen v. Barrack*, 376 U.S. at 643-646; *Coffey v. Van Dorn Iron Works*, 796 F.2d at 221. Thus, a transfer was unquestionably appropriate under 28 U.S.C. §1404(a). Of course, since the Respondent did not oppose the Petitioners' motion for a change of venue or seek review of the transfer order, the propriety of the transfer order is not in issue.

accomplished for the convenience of the parties and witnesses and in the interest of justice, to achieve a different result.

In holding to the contrary, the majority in the Third Circuit apparently based its decision on its perception that the Petitioners' actions constituted impermissible forum shopping. As this Court recognized in *Van Dusen*, however, federal law gives a plaintiff the right to select the forum with the most favorable law so long as it is a proper forum in which the case may be brought. *See Van Dusen v. Barrack*, 376 U.S. at 633-635; *Ferens v. Deere & Co.*, 862 F.2d at 35. Both jurisdiction and venue were undeniably proper in the Southern District of Mississippi; and the Petitioners were, therefore, clearly entitled to select Mississippi as their forum and gain the advantages of that state's favorable laws.[6] The Petitioners' proper exercise of their right to select a favorable forum cannot constitute improper forum shopping.

Nor was their motion to transfer improper forum shopping. Forum shopping necessarily implicates some attempt to select a forum with a more favorable procedural or substantive law. *See Ferens v. Deere & Co.*, 862 F.2d at 37 (Seitz, J., Dissenting). The Petitioners, however, had already obtained the advantage of the most favorable law by properly selecting Mississippi as their forum. The Petitioners could have proceeded to trial on the merits in Mississippi without being barred by the statute of limitations. Their transfer of the case to Pennsylvania provided them with no better law, either procedurally or substantively.

[6]Indeed, as Judge Seitz recognized in his dissent, the Petitioners had no choice but to file suit in Mississippi because of the pertinent statutes of limitations. *See Ferens v. Deere & Co.*, 862 F.2d at 37 (Seitz, J., Dissenting).

Rather, it simply made the trial of the case more convenient for all the parties and witnesses and a more efficient utilization of judicial resources. Providing for the trial of the case in a more convenient forum is the very purpose for which 28 U.S.C. §1404(a) was enacted. Its use by the Petitioners for that very purpose, when the resulting transfer did not provide them with a more advantageous law, cannot under any circumstances be construed as inappropriate forum shopping.[7]

II. The Decision Of The Third Circuit Holding That The Transferee District Court Is Not Obligated To Apply The Law Of The Transferor State When The Plaintiff Is The Moving Party Is In Conflict With The Reasoning In Decisions From Other Circuit Courts Of Appeal

Not only is the decision of the majority in *Ferens* in conflict with the reasoning of this Court in *Van Dusen*, it is also in conflict with the reasoning in decisions from other circuit courts of appeal. Other circuit courts which have addressed the issue of the applicable law following a plaintiff-initiated transfer under Section 1404(a) have concluded that, where the transferor district court was a proper forum, the law of the transferor state should continue to apply after the transfer. *See Martin v. Stokes*, 623 F.2d 469, 471 (6th Cir. 1980); *Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc.*, 689 F.2d 982, 991 n.14 (11th

[7]It is instead the rule announced by the majority in *Ferens* which will result in a plaintiff's being able to use 28 U.S.C. §1404(a) as a forum shopping device to obtain the application of more favorable law. As the majority acknowledges, its construction of Section 1404(a) will allow a less diligent plaintiff who has filed his lawsuit in a forum with less favorable law to utilize Section 1404(a) to obtain the advantages of the more favorable law of another forum by initiating a transfer. *See Ferens v. Deere & Co.*, 862 F.2d at 36.

Cir. 1982). *Cf. Gonzales v. Volvo of America Corp.*, 734 F.2d 1221, 1224 (7th Cir. 1984), *superseded*, 752 F.2d 295 (7th Cir. 1985).[8]

Martin v. Stokes, *supra*, contains a comprehensive review of the applicable law following transfers under both 28 U.S.C. §1404(a) and its companion section, 28 U.S.C. §1406(a), governing transfers where venue is improper. The Court concluded that the applicable law following a transfer does not depend on whether the transfer is made on the motion of the plaintiff or defendant but does depend upon whether the transfer is pursuant to Section 1404(a) or Section 1406(a). *Id.*, 623 F.2d at 471. In reaching this conclusion, the Court reasoned as follows:

> By determining the choice of law solely on the basis of the nature of the transfer, a result is reached that is consistent both with *Van Dusen* and the *Erie* doctrine. Once a plaintiff has exercised his choice of forum by selecting a permissible forum, the state law of that forum should govern the action, regardless of the wisdom of the plaintiff's selection. Thus, no matter who seeks to transfer the action to a more convenient forum under §1404(a), the state law of the forum in which the action was originally commenced remains

[8]The *Gonzales* case involved a plaintiff-initiated transfer pursuant to 28 U.S.C. §1404(a). In its original opinion the Court, citing *Martin v. Stokes*, *supra*, and *Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc.*, *supra*, held that when a plaintiff has exercised his choice of forum in the first instance by selecting a permissible forum, the state law of that forum should govern the action regardless of which party initiates a transfer. 734 F.2d at 1224. However, the Court subsequently issued a second opinion superseding its original opinion and deciding the case on other grounds. 752 F.2d 295. Consequently, the question of the effect on the applicable law of a plaintiff-initiated transfer under Section 1404(a) is unresolved in the Seventh Circuit. *Coffey v. Van Dorn Iron Works*, 796 F.2d at 221 n.6.

> controlling. In this manner, the outcome in the transferee district court will be the same as the outcome would have been in the state courts of the state where the action was originally brought.
>
> Accordingly, we conclude that the choice of law is dependent on the nature of the transfer. If an action is transferred under §1404(a), the state law of the transferor court should be applied.

Id., 623 F.2d at 473.[9] *See also In re Air Crash Disaster at Washington, D.C. on January 13, 1982*, 559 F. Supp. 333, 340 n.5 (D.D.C. 1983); *In re Richardson-Merrell, Inc.*, 545 F. Supp. 1130, 1135 (S.D. Ohio 1982), *aff'd*, 727 F.2d 608 (6th Cir. 1984); *Alexander v. Richardson-Merrell, Inc.*, 541 F. Supp. 93, 99 (S.D.N.Y. 1982); 1 J. Moore, Moore's Federal Practice, ¶0.145 [4.-5] (2d ed. 1988); Note, *Choice of Law in Federal Courts after Transfer of Venue*, 63 Cornell L. Rev. 149, 154-158 (1977).

The Ninth Circuit, without reference to whether the transfer was initiated by the plaintiff or the defendant, has simply concluded that where a case is transferred for the convenience of the parties pursuant to Section 1404(a), the transferee court must apply the law of the transferor court. *See Nelson v. International Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983). *See also Ross v. Colorado Outward Bound School, Inc.*, 822 F.2d 1524, 1527 (10th Cir. 1987); *Manley v. Engram*, 755 F.2d 1463, 1467 n.14 (11th Cir. 1985); *Truck Insurance Exchange v. Terziaff*, 683 F. Supp. 223, 225 (D. Nev. 1988); *RPJ Sportswear, Inc. v. Xylo Tex, Ltd.*, 681 F. Supp. 225, 227 (S.D.N.Y. 1988); *Western Smelting*

[9]The Sixth Circuit also pointed out that a choice of law rule based upon which party requested the transfer could lead to improper forum shopping by a plaintiff who had brought his action in a proper forum, but one that had less favorable state law. *Id.*, 623 F.2d at 472. *See* footnote 7, *supra*.

& Metals, Inc. v. Slater Steel, Inc., 621 F. Supp. 578, 581 (N.D. Ind. 1985); *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1086 (S.D.N.Y. 1984); *Subacz v. Town Tower Motel Corp.*, 567 F. Supp. 1308, 1316 (N.D. Ind. 1983). *Cf. Bott v. American Hydrocarbon Corp.*, 441 F.2d 896, 899 (5th Cir. 1971) (where the transfer originates in a suggestion by the court and with the concurrence of the defendant and no objection by the plaintiff, the law of the transferor court is applied).

Those cases cited by the majority in *Ferens* as supporting the application of the law of the transferee court after a plaintiff-initiated transfer under Section 1404(a) involved situations where jurisdiction or venue in the transferor state appeared to be improper. *See Carson v. U-Haul Co.*, 434 F.2d 916, 918 (6th Cir. 1970)[10]; *Parham v. Edwards*, 346 F. Supp. 968, 971-972 (S.D. Ga. 1972), *aff'd per curiam*, 470 F.2d 1000 (5th Cir. 1973). Section 1404(a) applies to actions which have been brought in a permissible forum. *See Martin v. Stokes*, 623 F.2d at 471. It is therefore appropriate that the law of an *improper* transferor court not be applied after a transfer. Otherwise, a plaintiff could gain the advantage of the law of a state where he could not have maintained his lawsuit by filing the lawsuit there and then transferring it to a state where venue and jurisdiction were proper, but the law was less favorable. *See Roofing & Sheet Metal Services, Inc. v.*

[10]The *Carson* case was distinguished by the Sixth Circuit in its subsequent opinion in *Martin v. Stokes*, 623 F.2d at 472 n.4, on the basis that the transferor court lacked jurisdiction. The Court, however, also overruled any inference in *Carson* that the applicable law depended upon whether the plaintiff or the defendant was seeking the transfer. "While some authorities . . . have emphasized the importance of the party seeking the transfer, [citations omitted], we believe that the more appropriate emphasis is on the nature of the transfer." *Id.*, 623 F.2d at 472.

LaQuinta Motor Inns, Inc., 689 F.2d at 991-992; *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1110 (5th Cir. 1981); *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 165 (3rd Cir. 1980), *rev'd on other grounds*, 454 U.S. 235 (1981).

In the present case, however, venue and jurisdiction were *proper* in the Southern District of Mississippi. The overwhelming weight of authority recognizes that where the original forum is a proper one, a convenience transfer under Section 1404(a) should carry with it no change in the applicable law. This Court should issue a writ of certiorari in this case so that the contrary decision by the majority in *Ferens* may be reversed.

III. This Case Involves An Important Question Of Federal Law Which Should Be Settled By This Court

This Court granted certiorari in *Van Dusen* because it recognized that the case involved important questions concerning the construction and operation of a federal statute, 28 U.S.C. 1404(a). *See Van Dusen v. Barrack*, 376 U.S. at 615. One important question left open by this Court's Opinion in *Van Dusen* was whether the Court's holding should be extended to cases where the plaintiff initiates the transfer from a proper forum to a more convenient one. While most of the circuit courts which have addressed this issue have correctly concluded that the reasoning and analysis in *Van Dusen* compels the same result with respect to such plaintiff-initiated transfers, the majority in *Ferens* has now come to a contrary conclusion.

The construction and operation of 28 U.S.C. §1404(a) with respect to plaintiff-initiated transfers will have a significant impact on the functioning and administration of the federal court system. The rule announced in *Ferens* will result in the congestion of cases in districts which,

although proper as to venue and jurisdiction, have little relation to the underlying causes of action, which causes of action could more conveniently and efficiently be tried in other appropriate districts. Moreover, the chill placed upon plaintiff-initiated transfers will result in the greater likelihood of multiple lawsuits being filed and tried in different districts even though they arise out of a single set of facts.

At present, a plaintiff's ability to transfer a case from a proper forum to a more convenient proper forum, without a change in the applicable law, depends entirely upon the fortuitous location of the more convenient forum in a circuit other than the Third Circuit. This Court should issue a writ of certiorari in this case so that an important question of federal law may be finally settled and so that uniformity may be established as to the functioning of the federal court system.

CONCLUSION

For the foregoing reasons the Petitioners respectfully pray that their petition for a writ of certiorari be granted.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3595

ALBERT J. FERENS and
MARGARET L. FERENS, his wife

v.

DEERE & COMPANY,

(D.C. Civil No. 85-1534)

ALBERT J. FERENS and
MARGARET L. FERENS, his wife

v.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY

(D.C. Civil No. 85-2725)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued: March 5, 1987
Decided May 28, 1987

On Remand from the Supreme Court of the United States

Before: GIBBONS, Chief Judge and SEITZ and ALDISERT, Circuit Judges

(Opinion filed November 25, 1988)

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OPINION OF THE COURT

GIBBONS, Chief Judge:

The present action is here on remand from the Supreme Court for reconsideration in light of *Sun Oil Co. v. Wortman*, 56 U.S.L.W. 4601 (1988). In *Ferens v. Deere & Co.*, 819 F.2d 42 (3d Cir. 1987) *vacated and remanded* 486 U.S. (1988), this court held that a Mississippi court could not apply Mississippi's statute of limitations to a tort which occurred in Pennsylvania where both plaintiffs were residents of Pennsylvania and the combine was purchased in Pennsylvania. This panel held that application of the laws of Mississippi would have been "arbitrary, fundamentally unfair, and therefore unconstitutional." *Id.* at 427. The district court determination that Pennsylvania's statute of limitations was applicable and therefore barred the action was affirmed. Because Mississippi was found to

be constitutionally obligated to apply the Pennsylvania statute of limitation, this court never addressed which forum's statute of limitations applies to the diversity action as a result of its having been filed in the Federal District Court for the Southern District of Mississippi and transferred pursuant to 28 U.S.C. § 1404(a) (1982) to the Federal Court for the Western District of Pennsylvania. Under the court's reasoning, both states and hence both district courts[1] would apply the Pennsylvania statute of limitations making it unnecessary to determine if the transferor or transferee forum's law applied following plaintiff's successful request for transfer pursuant to § 1404(a). This reasoning is inconsistent with the Supreme Court's determination in *Sun Oil Co. v. Wortman*. The Constitution does not preclude Mississippi's practice of applying its own statute of limitations to actions in its courts which are governed by the substantive law of another state. Thus, this court must address the previously undetermined question of which forum's law governs following a change of venue under 28 U.S.C. § 1404(a) which was granted pursuant to plaintiff's request. Under the circumstances of this case, we hold that the transferee forum's law applies (Pennsylvania).

Albert J. Ferens and Margaret L. Ferens brought this appeal from a summary judgment which was entered in favor of defendant, Deere & Company (Deere), in their product liability action grounded in diversity. The district court held that the action was time barred by Pennsylvania's two-year statute of limitations. *See* 42 Pa. Cons. Stat. Ann. § 5524(2) (Purdon 1981).

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1. *See Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941) (federal courts sitting in diversity actions generally apply the choice of law of the state in which they sit).

Because the action was transferred pursuant to 28 U.S.C. § 1404(a) (1982), from the Southern District of Mississippi to the Western District of Pennsylvania, the appellants contend that Mississippi's six-year statute of limitations for personal injuries governs. *See* Miss. Code Ann. § 15-1-49 (1972). We disagree. Thus we affirm the district court's judgment.

I.

The Ferenses reside in Dunbar, Fayette County, Pennsylvania. In July, 1981, Mr. Ferens purchased, for use on his farm, a John Deere Sidehill No. 6620 combine from the Uniontown Farm Equipment Company in Uniontown, Washington County, Pennsylvania. The combine was manufactured and distributed by Deere, a Delaware corporation with its principal place of business in Moline, Illinois. It had been sold by Deere to Uniontown for resale. On July 5, 1982, in Washington County, Pennsylvania, while Mr. Ferens was cleaning the combine, his right hand became enmeshed in its rotating augur and was severed above the wrist.

On July 3, 1985, the Ferenses filed Civil Action No. 85-1534 in the Western District of Pennsylvania, alleging that Deere breached certain express and implied warranties of merchantability and fitness for use, in violation of the Pennsylvania Commercial Code. *See* 13 Pa. Cons. Stat. Ann. §§ 1101-9507 (Purdon 1984). This breach of warranty action, which is still pending, seeks compensation for Mr. Ferens' personal injuries. Under Pennsylvania law, a four-year statute of limitations governs actions for breach of warranty. *See* 13 Pa. Cons. Stat. Ann. § 2725 (Purdon 1984); 42 Pa. Cons. Stat. Ann. § 5525 (Purdon 1981).

On July 25, 1985 the Ferenses also filed Civil Action No. 85-2725 in the Southern District of Mississippi, Jackson Division, seeking identical

damages as those sought in Pennsylvania for the same personal injuries suffered in the July 5, 1982 accident. In the Mississippi action, recovery was based on theories of negligence and strict liability in tort. Specifically, the Ferenses claimed that the combine was defective and that Deere failed to warn of the defects. The Ferenses chose Mississippi because Deere was qualified to do business there, having had appointed a local registered agent, as it had in many other states, and because the Mississippi statute of limitations for personal injuries is six years.[2] *See* Miss. Code Ann. § 15-1-49 (1972). The Ferenses did not allege that Deere designed or manufactured the combine in Mississippi, or that they ever set foot in that state.

After Deere filed an answer in the Mississippi action, the Ferenses made a motion, pursuant to 28 U.S.C. § 1404(a), to transfer their case to the Western District of Pennsylvania, claiming, inter alia, a) that they resided in Pennsylvania; b) that the accident occurred in Pennsylvania; c) that their claim had no connection with Mississippi; d) that a substantial number of material witnesses resided in the Western District of Pennsylvania, while none were in Mississippi; e) that a substantial number of necessary documentary exhibits were in the Western District of Pennsylvania, while none were in Mississippi; and f) that the breach of warranty action pending in the Western District of Pennsylvania, involving the same accident, presented common questions of fact and law. On November 8, 1985, the transfer motion was granted and on November 21, 1985 the breach of warranty

2. Pennsylvania has a two-year state of limitations for personal injuries. 42 Pa. Cons. Stat. Ann. § 5524(2) (Purdon 1981) which had run when this action was filed three years after the accident occurred.

action and the negligence and strict liability action were consolidated for all purposes.

On February 20, 1986, Deere made a motion for summary judgment on all claims, asserting that the Pennsylvania statute of limitations barred the negligence and strict liability claims, and that the terms of its written warranty precluded the breach of warranty claims. The district court held that, despite the fact that the negligence and strict liability action had been transferred from Mississippi, it was governed by the Pennsylvania statute of limitations. Additionally, the court held that material fact issues prevented summary judgment in the breach of warranty action. Thus, summary judgment was entered on the negligence and strict liability claims, and the court directed the entry of final judgment pursuant to Fed. R. Civ. P. 54(b). The Ferenses appealed. The breach of warranty case has been stayed pending its resolution.

On appeal, this panel determined that Mississippi courts were constitutionally required to apply Pennsylvania's statute of limitations to the present action. *Ferens v. Deere & Co.*, 819 F.2d 42 (3d Cir. 1987) vacated and remanded 486 U.S. (1988). We thus affirmed the district court determination that Pennsylvania's two-year statute of limitation barred the negligence and strict liability actions. We did not address whether the law of the transferor or transferee forum applied reasoning that the law applied would be the same in either forum. The Supreme Court granted certiorari, vacated and remanded the opinion for reconsideration in light of *Sun Oil Co. v. Wortman*, 56 U.S.L.W. 4601 (1988). This panel's determination in *Ferens v. Deere & Co.* is inconsistent with *Sun Oil*.

In *Sun Oil Co. v. Wortman*, 56 U.S.L.W. 4601 (1988), the Supreme Court held that a state court may choose to apply its own statute of limitations to claims

governed by the substantive laws of another state without violating either the full faith and credit clause or the due process clause. The Court's Opinion stated that statutes of limitations are procedural and the forum is entitled to apply its own procedural laws for choice of law purposes.[3] The Court explicitly rejected the suggestion that statutes of limitation should be treated substantively for conflict of law purposes to be consistent with their treatment for *Erie* doctrine purposes. *Id.* at 4604; *see also Guaranty Trust v. York*, 326 U.S. 99 (1945) (federal district courts sitting in diversity actions must apply the substantive law of the state in which they sit including statutes of limitation). The Supreme Court explained:

> Except at the extremes, the terms "substance" and "procedure" precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn. In the context of

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3. Justice O'Connor, joined by the Chief Justice, concurred in the determination that the forum may treat its statute of limitation as procedural and apply it to a case governed by the substantive law of another state only so long as this other state treats its statute of limitations as procedural. These concurring Justices reserved the question of whether a forum may apply its statute of limitations to a case where the governing substantive state law treats its statute of limitations as substantive. *Sun Oil v. Wortman*, 56 U.S.L.W. at 4608. This issue is not raised in the present context. Pennsylvania treats its statute of limitations as procedural. *See Butler v. Dresser Corp.*, 310 F. Supp. 1265 (W.D. Pa. 1970).

In another separate concurrence, Justices Brennan, Marshall and Blackmun concurred in the result permitting application of the forum's statute of limitations but did so through different reasoning. 56 U.S.L.W. at 4606. These Justices reasoned that conducting the litigation gave the forum sufficient procedural interests in the litigation to constitutionally permit application of the forum's statute of limitations. *Id.* at 4607. Justice Kennedy did not take part in the consideration or decision of this case.

> our *Erie* jurisprudence. [citations omitted], that purpose is to establish (within the limits of applicable federal law, including the prescribed Rules of Federal Procedure) substantial uniformity of predictable outcome between cases tried in federal court and cases tried in the State in which the federal court sits. [citations omitted] The purpose of the substance procedure dichotomy in the context of the Full Faith and Credit Clause, by contrast, is not to establish uniformity but to delineate spheres of state legislative competence.

Hence, a state may apply its own statute of limitations to an action governed by the substantive law of another state.

Mississippi treats its statute of limitations as procedural for choice of law purposes and applies it to actions even though they are otherwise governed by the substantive law of another state. *See Vick v. Cochran*, 316 So. 2d 242, 246 (Miss. 1975). This court's prior decision that the Full Faith and Credit Clause and the Due Process Clause require Mississippi courts to apply Pennsylvania's statute of limitation is inconsistent with the Supreme Court's determination in *Sun Oil Co. v. Wortmann*, supra. Thus, Mississippi state courts and federal courts sitting in diversity actions would apply the Mississippi statute of limitations to this action. This raises the question left unresolved by this panel's last decision: following plaintiff's successful request for change of venue pursuant to 28 U.S.C. § 1404(a), does the law of the transferor or transferee forum control?

II

The Ferenses position is straightforward. Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), federal district courts sitting in

diversity must apply the choice-of-law rule of the state in which they sit. Thus, a Mississippi federal district court sitting in diversity would apply Mississippi's six-year statute of limitations to the present action because that is what a Mississippi state court would do. *See Vick v. Cochran*, 316 So. 2d 242 (Miss. 1975). Moreover, under *Van Dusen v. Barrack*, 376 U.S. 612 (1964), when a defendant obtains a transfer pursuant to 28 U.S.C. § 1404(a), the law of the transferor forum applies. Ferenses contend that the same rule should apply when a plaintiff obtains a transfer under § 1404(a).[4] Following from this contention, the transferee Pennsylvania federal district court in the present action should have applied the same law as the transferor Mississippi federal district court would have applied which is the same law that a Mississippi state court would have applied which is Mississippi's six year statute of limitations. We disagree.

In *Van Dusen v. Barrack*, plaintiffs, as the personal representatives of the decedents, brought 40 wrongful death actions in the Eastern District of Pennsylvania for deaths resulting from an airplane crash in Massachusetts. 376 U.S. 612 (1964). Pursuant to the defendants' request, the district court ordered these actions transferred to Massachusetts where over 100 similar actions were pending. Plaintiffs objected to the transfer because they were not legal representatives of the decedents pursuant to

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4. In *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (1979), the Court of Appeals for the Tenth Circuit held that the law of the transferor forum applied in a case involving a plaintiff-initiated transfer under § 1404(a). The court simply stated that *Van Dusen v. Barrack* provided support for this position. *Id.* at 792. It did not discuss the fact that the Supreme Court explicitly limited its holding in *Van Dusen v. Barrack* to defendant initiated transfers, 376 U.S. at 640, leaving the question of plaintiff initiated transfers unresolved.

Massachusetts law. The Court of Appeals vacated the transfer order holding that it could be granted only if the plaintiffs were legal representatives under Massachusetts law. The Supreme Court granted certiorari and reinstated the transfer order. The Court held that in a case where defendant obtains a change of venue under § 1404(a), the state law of the transferor forum will govern.

In *Van Dusen*, the Supreme Court explained that § 1404(a) is designed to promote convenience. *Id.* at 634-35. Yet, federal law gives plaintiffs the right to choose the forum with the most favorable law and defendants should not be able to use § 1404(a) to defeat plaintiff's choice of law:

> There is nothing, however, in the language or policy of § 1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue. . . . § 1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court.

Id. at 633-35. The Supreme Court stated that § 1404(a) should not be construed to allow forum shopping. *Id.* at 636-38. Accordingly, § 1404(a) should be interpreted in a manner that promotes federal-state uniformity. *Id.*; *see also Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (federal courts sitting in diversity apply the substantive law of the state in which they sit). While the *Erie* doctrine generally calls for uniformity between a federal court and the state courts where it sits, the *Van Dusen* situation was different. Because

the plaintiffs in *Van Dusen* had exercised their federal venue privilege to choose Pennsylvania federal court and the defendants had sought transfer to Massachusetts, the Court held that § 1404(a) should be construed to achieve uniformity between the Massachusetts federal court (transferee court) and the state courts of Pennsylvania where the action was filed. This protected plaintiff's venue choice as to law and prevented the use of § 1404(a) as a forum shopping device by defendants. Defendants were not able to use § 1404(a) in Pennsylvania's federal courts to obtain a result that they could not obtain in the state courts of Pennsylvania.

In *Ferens v. Deere & Co.*, we are faced with the same problem in a different guise: plaintiffs are attempting to use § 1404(a) to forum shop. They are time-barred from bringing their action in the state courts of Pennsylvania or directly in a diversity action in the federal courts sitting in Pennsylvania. They hope to do indirectly what they cannot do directly. They hope to use § 1404(a) and a brief stop in Mississippi to achieve a result in the federal courts of Pennsylvania that they could not achieve in the state courts of Pennsylvania. If allowed, this result would be contrary to the principles set forth in *Van Dusen*.

In *Ferens*, unlike *Van Dusen*, there is no danger of the defendant using § 1404(a) to defeat the plaintiff's federal venue privilege. In *Ferens*, the plaintiffs obtained the change of venue. In effect, the *Ferenses* choice of venue is the transferee forum, Pennsylvania.[5]

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5. The courts are not unanimous. *See Carson v. U-Haul Co.*, 434 F.2d 916, 918 (6th Cir. 1970) ("We hold only that since transfer was at the request of the plaintiffs, Georgia was no longer the forum state, Kentucky became the new forum state and its statute of limitations controlled."); *Parham v. Edwards*, 346 F. Supp. 968 (S.D. Ga. 1972) *aff'd per curiam* 470 F.2d 1000 (5th Cir. 1973). *But see Martin v. Stokes*, 623 F.2d 469 (6th Cir. 1980) (overturning *Carson v. U-Haul Co.*) (Applicable law is determined by the type of

Under these circumstances, there is no reason to depart from the goal of federal-state uniformity as set forth in *Erie*: § 1404(a) should be construed to obtain uniformity between the Pennsylvania federal courts (transferee forum) and the state courts of Pennsylvania. The Pennsylvania state courts would apply Pennsylvania's two-year statute of limitations. *See Butler v. Dravo Corp.*, 310 F. Supp. 1265 (W.D. Pa. 1970).

Applying the transferee forum's state law to plaintiff-initiated § 1404(a) transfers will prevent forum shopping by plaintiffs who hope to bootstrap the favorable law of another state into a convenient but otherwise unfavorable forum. We recognize that this construction of § 1404(a) may allow plaintiffs to correct a mistake as to which forum has the most favorable law in cases where plaintiffs initially file in a less favorable forum. *But see Mata v. Budd Company*, 44 F.R.D. 225 (E.D. Pa. 1968) (District court denied plaintiff's request for transfer to a forum where the action was not time barred because such "legal footwork" was against the "interests of justice."). Yet, allowing plaintiffs to correct a choice of venue error is less problematic than allowing plaintiffs to bootstrap favorable law into a forum. If the Ferenses'

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transfer, not the party making the motion: state law of transferor forum applies to § 1404(a) transfers; whereas, state law of transferee forum applies to § 1406(a) transfers.); *Nelson v. International Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983) (follows *Martin v. Stokes*, applicable law depends on the type of the transfer); *see also Gonzalez v. Volvo of America*, 734 F.2d 1221 (7th Cir. 1984) (choice of law of the transferor forum applies to plaintiff-initiated § 1404(a) transfers); *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979); *Schenk v. Piper Aircraft Corp.*, 377 F. Supp. 477, 480 (W.D. Pa. 1974) (Pennsylvania statute of limitations barred wrongful death action; plaintiff's request for transfer denied by district court which reasoned that transferee forum was required to apply the law of transferor forum).

construction of § 1404(a) was accepted by this court. § 1404(a) would turn the longest state statute of limitation into the federal statute of limitation to be applied in diversity cases where the plaintiffs can initially bring the action in the favorable state and subsequently transfer it to the convenient forum. The better construction of § 1404(a) is that the state law of the transferee forum applies to plaintiff-initiated transfers.

The district court held that Pennsylvania's two-year statute of limitations barred the present action. We will affirm the judgment of the district court.

SEITZ, Circuit Judge, dissenting.

I agree with the majority that, in light of *Sun Oil Co. v. Wortman*, 56 U.S.L.W. 4601 (1988), its earlier opinion imposing substantive due process limitations on a state court's application of its own statute of limitations lacks continuing vitality. The majority goes on, however, to construe the transfer statute (§404(a)) in the present context to require transferee forum's statute of limitations to be applied by the transferee court. Once again, I regretfully find myself unable to agree.

In its earlier opinion in this case, the majority, for whatever reason, did not first address the defendant's contention that the transfer statute did not require the transferee forum to apply the transferor forum's statute of limitations when the transfer motion was made by the plaintiff in the present context. Because I disagreed with the majority's resolution of the

constitutional issue, I reached and rejected the defendant's statutory position. *Ferens v. Deere & Company, et al.*, 809 F.2d 423, 427-28 (3d Cir. 1987), vacated, 108 S. Ct. 2862 (1988). I continue to believe that analysis is correct and am content to summarize those views here.

It is undisputed that when plaintiffs filed suit in the Southern District of Mississippi, it was a permissible forum insofar as personal jurisdiction and venue were concerned. When plaintiffs filed a motion in that court under section 1404(a) to transfer the action to the Middle District of Pennsylvania, they were asking, in terms of section 1404(a), that the transfer be granted "for the convenience of parties and witnesses, [and] in the interest of justice." It contains no language limiting its availability to defendants. But there is a much more important reason not to import into the transfer statute a change of law provision where a plaintiff is concerned. The objective of the transfer statute is solely trial convenience. Its use has nothing to do with change of law. *VanDusen v. Barrack*, 376 U.S. 612 (1964). The Supreme Court has made this perfectly clear by emphasizing that the sole purpose of the transfer statute is to change the courtroom. As recently as June of this year, the Supreme Court stated, albeit in a different context, that "Section 1404(a) is doubtless capable of classification as a procedural rule; and, indeed, we have so classified it in holding that a transfer pursuant to § 1404(a) does not carry with it a change in the applicable law." *Stewart Organization v. Ricoh Corp.*, 108 S. Ct. 2239, 2245 (1988).

I conclude, as I did in my earlier dissent, that section 1404(a) contains no language expressing an intent to exclude a plaintiff from invoking it. More to the point, it does not provide for a change of law when a case is transferred at the instance of a plaintiff.

Apparently, the sole justification for the majority's position seems to be that to allow a plaintiff to invoke section 1404(a) is to permit "forum shopping." The use of this epithet here does not withstand analysis. Forum shopping refers to choosing the most favorable place to bring suit, whether as a matter of substance or procedure. K. Redden & E. Veron, *Modern Legal Glossary* 283 (1980). Thus, it implicates some choice. Here plaintiffs had no choice at the time they decided to sue. Mississippi provided the only available forum given the pertinent statutes of limitations. There's was a classic Hobson's Choice. Consequently, the act of filing suit in Mississippi, the only available forum, did not constitute forum shopping as that term is usually understood.

Did the action of plaintiffs in moving for a transfer under section 1404(a) involve any form of forum shopping? Since "a transfer under 1404(a) does not carry with it a change in the applicable law," one may ask how forum shopping is even relevant. The granting of the motion did not give plaintiffs a substantive or procedural benefit they did not already have in Mississippi. *Stewart Organization, Inc. v. Ricoh Corp.*, 108 S. Ct. at 2245. Indeed, the only benefit which the plaintiffs can be said to enjoy is one that they share in common with the defendants: namely, that the litigation be conducted in the most convenient forum for those concerned.

I conclude where I began. Forum shopping is irrelevant to the objectives of the transfer statute because a transfer gives a plaintiff no procedural or substantive right he did not already possess.

I would reverse the judgment of the district court.

A True Copy:

Teste:

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(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

Appendix B

In the Supreme Court of the United States

Albert J. FERENS, et ux, petitioners, v. DEERE & COMPANY. No. 87-477.

Case below, 639 F. Supp. 1484; 819 F.2d 423.

June 27, 1988. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Sun Oil Company v. Wortman*, 486 U.S. ___, 108 S.Ct. 2117, 99 L.Ed.2d ___ (1988).

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3595

ALBERT J. FERENS and
MARGARET L. FERENS, his wife

v.

DEERE & COMPANY,

(D.C. Civil No. 85-1534)

ALBERT J. FERENS and
MARGARET L. FERENS, his wife

v.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY

(D.C. Civil No. 85-2725)

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Argued: March 5, 1987
Before: GIBBONS, *Chief Judge* and SEITZ
and ALDISERT, *Circuit Judges*

(Opinion Filed: May 28, 1987)

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OPINION OF THE COURT

GIBBONS, *Chief Judge*:

Albert J. Ferens and Margaret L. Ferens appeal from a summary judgment which was entered in favor of defendant, Deere & Company (Deere), in their product liability action grounded in diversity. The district court held that the action was time barred by Pennsylvania's two-year statute of limitations. *See* 42 Pa. Cons. Stat. Ann. § 5524 (2) (Purdon 1981). Because their action was transferred pursuant to 28 U.S.C. § 1404(a)(1982), from the Southern District of Mississippi to the Western District of Pennsylvania, the Ferenses contend that the governing time limitation is Mississippi's six-year statute of limitations for personal injuries. *See* Miss. Code Ann. § 15-1-49 (1972). We affirm.

I.

The Ferenses reside in Dunbar, Fayette County, Pennsylvania. In July, 1981 Mr. Ferens purchased for use on his farm a John Deere Sidehill No. 6620 combine from the Uniontown Farm Equipment Company in Uniontown, Washington County, Pennsylvania. The combine was manufactured and distributed by Deere, a Delaware corporation with its principal place of business in Moline, Illinois and had been sold by Deere to Uniontown for resale. On July 5, 1982, in Washington County, Pennsylvania, while Mr. Ferens was cleaning the combine, his right hand became enmeshed in its rotating augur and was severed above the wrist.

On July 3, 1985 the Ferenses filed Civil Action No. 85-1534 in the Western District of Pennsylvania, alleging that Deere breached certain express and implied warranties of merchantability and fitness for use, in violation of the Pennsylvania Commercial Code. *See* 13 Pa. Cons. Stat. Ann. §§ 1101-9507 (Purdon 1984). This breach of warranty action, which is still pending, seeks compensation for Mr. Ferens' personal injuries. Under Pennsylvania law, a four-year statute of limitations governs actions for breach of warranty. *See* 13 Pa. Cons. Stat. Ann. § 2725 (Purdon 1984); 42 Pa. Cons. Stat. Ann. § 5525 (Purdon 1981).

On July 25, 1985 the Ferenses also filed Civil Action No. 85-2725 in the Southern District of Mississippi, Jackson Division, seeking identical damages as those sought in Pennsylvania for the same personal injuries suffered in the July 5, 1982 accident. In the Mississippi action, recovery was based on theories of negligence and strict liability in tort. Specifically, the Ferenses claimed that the combine was defective and that Deere failed to warn of the defects. The Ferenses chose Mississippi because Deere

was qualified to do business there, having had appointed a local registered agent, as it had in many other states, and because the Mississippi statute of limitations for personal injuries is six years.[1] *See* Miss. Code Ann. § 15-1-49 (1972). The Ferenses did not allege that Deere designed or manufactured the combine in Mississippi, or that they ever set foot in that state.

After Deere filed an answer in the Mississippi action, the Ferenses made a motion, pursuant to 28 U.S.C. § 1404(a), to transfer their case to the Western District of Pennsylvania, claiming, *inter alia*, a) that they resided in Pennsylvania; b) that the accident occurred in Pennsylvania; c) that their claim had no connection with Mississippi; d) that a substantial number of material witnesses resided in the Western District of Pennsylvania, while none were in Mississippi; e) that a substantial number of necessary documentary exhibits were in the Western District of Pennsylvania, while none were in Mississippi; and f) that the breach of warranty action pending in the Western District of Pennsylvania, involving the same accident, presented common questions of fact and law. On November 8, 1985, the transfer motion was granted and on November 21, 1985 the breach of warranty action and the negligence and strict liability action were consolidated for all purposes.

On February 20, 1986, Deere made a motion for summary judgment on all claims, asserting that the Pennsylvania statute of limitations barred the negligence and strict liability claims, and that the terms of its written warranty precluded the breach of

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[1] Pennsylvania has a two-year statute of limitations for personal injuries, 42 Pa. Cons. Stat. Ann. § 5524(2) (Purdon 1981) which had run when this action was filed three years after the accident occurred.

warranty claims. The district court held that, despite the fact that the negligence and strict liability action had been transferred from Mississippi, it was governed by the Pennsylvania statute of limitations. Additionally, the court held that material fact issues prevented summary judgment in the breach of warranty action. Thus, summary judgment was entered on the negligence and strict liability claims, and the court directed the entry of final judgment pursuant to Fed. R. Civ. P. 54(b). This appeal followed. The breach of warranty case has been stayed pending its resolution.

II.

The Feresses' position is straightforward. Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), federal district courts sitting in diversity must apply the choice-of-law rule of the state in which they sit. Moreover, under *Van Dusen v. Barrack*, 376 U.S. 612 (1964), when a diversity action is transferred from one federal district court to another, the transfer does not result in the application of a new choice-of-law rule. Thus, the Feresses urge, the District Court for the Western District of Pennsylvania was obliged to apply Mississippi's choice-of-law rule with respect to the statute of limitations governing personal injury cases. The Feresses insist that Mississippi in this case would apply its own statute of limitations, and that therefore the Western District of Pennsylvania must do likewise.

The issue presented in the instant appeal, however, is not as facile as the Feresses would have us believe. Their arguments ignore the constitutional limits imposed upon the application of transferor state law. Thus, we begin with an examination of Mississippi law, which is aberrational in two respects.

First, Mississippi has adopted a highly unusual six-year statute of limitations for personal injury actions,[3] whereas most states have two-or three-year statutes of limitations for such claims. Second, the Mississippi Supreme Court has made an exceptionally uncommon interpretation of its borrowing statute. Like most jurisdictions in the United States, Mississippi has adopted a borrowing statute with respect to time limitations on actions.[4] The Mississippi version provides:

> When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country, or of some other state and country where the defendant has resided before he resided in this state, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.

Miss. Code Ann. § 15-1-65 (1972).

On its face, Mississippi's borrowing statute would seem to suggest that Mississippi would look to Pennsylvania for the limitations period governing the Feresses negligence and strict liability claims since

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[3]Only five states have six-year statutes of limitations for personal injury claims. *See* Me. Rev. Stat. Ann. tit. 14, § 752 (1964); Minn. Stat. § 541.05 (Supp. 1987); Miss. Code Ann. § 15-1-49 (1972); N.D. Cent. Code § 28-01-16 (1974); S.C. Code Ann. § 15-3-530 (Law Co-op 1977).

[4]Pennsylvania borrowing statute, for example, provides:

> The period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, whichever first bars the claim.

42 Pa. Cons. Stat. Ann. § 5521 (Purdon 1981).

those claims would be time barred in Pennsylvania. Relying on the clause "where the defendant has resided before he resided in this state," however, the Mississippi Supreme Court has held that its borrowing statute "only applies where a non-resident in whose favor the statute has accrued afterward moves into this state." *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 667, 131 So. 84, 88 (1930); *see also Cowan v. Ford Motor Co.*, 719 F.2d 785 (5th Cir. 1983) (applying the Mississippi Supreme Court's interpretation of § 15-1-65). Because Deere was qualified to do business in Mississippi at the time this action accrued, it would be treated as a resident of Mississippi under Mississippi law. *See Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009, 1011 (5th Cir. 1969). Thus, the Ferenses argue that because the Mississippi borrowing statute is inapplicable, Mississippi would apply its own statute of limitations, and under *Klaxon* and *Barrack* the federal courts must do likewise.

Oddly, the one federal appellate court which has confronted the anomaly of applying a Mississippi statute of limitations to an action having no nexus with that state, *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979), has applied *Klaxon* and *Barrack* in the manner which the Ferenses urge. In *Schreiber*, a Kansas plaintiff was injured in Kansas by a product manufactured by a Delaware corporation with its principal place of business in Wisconsin. After the expiration of the Kansas statute of limitations but before the expiration of the Mississippi statute, the Kansas plaintiff sued in the federal district court in Mississippi, which thereafter transferred the action, pursuant to 28 U.S.C. § 1404(a), to a federal district court in Kansas. The federal district court in Kansas refused to apply the Mississippi statute of limitations.

See 448 F. Supp. 1079 (D. Kan. 1978). The Court of Appeals for the Tenth Circuit, however, reversed, holding that *Van Dusen v. Barrack* controlled and that the Mississippi statute of limitations applied.

Although *Schreiber v. Allis-Chalmers Corp.* is precisely on point,[*] it has been severely criticized. *See* E. Scoles & P. Hay, *Conflict of Laws* 132 (1984); Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 Washburn L.J. 405, 421 (1980); Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 Ariz. St. L.J. 1, 56-65. We agree with the critics that at most, *Klaxon* and *Barrack* require a federal diversity forum to apply a state choice-of-law rule which the state court could, as a matter of federal law, lawfully apply. Indeed, the *Van Dusen v. Barrack* Court expressly acknowledged as much. The Court, in rejecting the contention that a section 1404(a) transfer would result in a prejudicial change of law, observed:

> In so ruling, however, we do not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee State.[41]

41. We do not suggest that the application of transferor state law is free from constitutional limitations. *See, e.g., Watson v. Employers Liability Assurance Corp., Ltd.*, 348 U.S. 66,

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[*] While Deere points out that in *Barrack* and in *Schreiber* the transfer motion . . . were made by defendants, *see Barrack*, 376 U.S. at 614; *Schreiber*, 611 F.2d at 791, and that in the instant appeal the section 1404(a) motion was made by the plaintiff, *see* 15 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure, § 3846 (2d ed. 1986), our decision today does not depend on this distinction.

Hughes v. Fetter, 341 U.S. 609; *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493; *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532; *Home Ins. Co. v. Dick*, 281 U.S. 397.

Van Dusen v. Barrack, 376 U.S. at 639. Thus, the *Barrack* Court reasserted the continuing authority of those cases which, under the due process and full faith and credit clauses, have established federal limits upon aberrational state choice-of-law rules.

Moreover, the *Barrack* Court's reference to *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), is for present purposes particularly significant. *Dick* involved a Texas state court applying Texas law to avoid the application of a contract term that barred any action on the insurance policy commenced after one year. The policy had been issued in Mexico to a Mexican citizen, covering a Mexican risk, and a Mexican loss had in fact occurred. The contract term in question was valid under Mexican law. The *Dick* court held that by applying its own longer limitation of actions policy instead of that of the jurisdiction having more significant contacts with the occurrence (Mexico), Texas violated the due process clause. *See Dick*, 281 U.S. at 408; *see also Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934) (Mississippi courts cannot void limitation of action provision in Tennessee insurance policy).

Although both *Dick* and *Delta & Pine Land Co.* involved contracts incorporating shorter limitations than those authorized by the governing state law, those holdings are not limited to contractual situations. As Justice Brennan explained in *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 310-11 (1981):

> *Dick* and *[John Hancock Mutual Life Insurance Co. v. Yates*, 299 U.S. 178 (1936)] stand for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional. *Dick* concluded that nominal residence – standing alone – is inadequate; *Yates* held that postoccurrence change of residence to the forum State – standing alone – was insufficient to justify application of forum law.

All the cases decided by the Supreme Court after *Dick* which permitted the application of forum law over due process or full faith and credit objections involved situations in which the forum state had some contact with the case and some interest by virtue of that contact, justifying the application of the forum state's law. *See Hague*, 449 U.S. at 312-13; Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 Washburn L.J. 405, 421 (1980).

The instant appeal presents the precise situation to which Justice Brennan refers in *Hague* – nominal residence, standing alone. Deere is nominally a resident of Mississippi because, in order to do business there, it has appointed a local resident agent. The lawsuit does not grow out of any business which Deere conducted in Mississippi. Mississippi has no interest in the injuries sustained by Mr. Ferens, or in the transaction by which he acquired the combine that injured him. Mississippi's contacts with the parties and the occurrence or transaction are plainly so insignificant that the application of its law would be arbitrary, fundamentally unfair, and therefore unconstitutional. *See Hague*, 449 U.S. at 312-13.

III.

Consequently, because Mississippi could not apply its own law to the Ferenses' suit against Deere if the suit were pending in a Mississippi state court, neither *Klaxon* nor *Barrack* require that a federal diversity forum do so either. Conversely, since the Ferenses are Pennsylvania residents, the injury occurred in Pennsylvania, and the combine was acquired there, Pennsylvania has substantial contacts with the occurrence, thereby rendering the application of its law neither arbitrary nor fundamentally unfair.[5] Hence, the district court did not err in rejecting the applicability of the Mississippi statute of limitations.

The judgment appealed from will therefore be affirmed.

[5]Because we hold that Mississippi could not constitutionally apply its law in this case, we have no reason to consider whether, as Deere contends, the *Van Dusen* v. *Barrack* rule applies only where a defendant makes a section 1404(a) motion. *See* note 4 *supra*.

Seitz, *Circuit Judge*, dissenting.

It is hardly original to say that hard cases make bad law. Depending on one's perspective, this case involves either skillful lawyering within established rules to obtain favorable law or unfair forum-shopping. The majority, in my view, has unwarrantedly imposed constitutional limitations on a forum's choice of law to prevent the Ferenses from gaining an advantage under the provisions of 28 U.S.C. § 1404(a).

The majority holds that it would be unconstitutional for a Mississippi state court to apply its statute of limitations in this case. In so holding, it ignores the distinction between the constitutional limitations on a forum's choice of substantive law and a forum's application of its procedural law.

The forum has traditionally applied its state's statute of limitations, regardless of what state's substantive law controlled. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n.10 (1984); *Scudder v. Union National Bank*, 91 U.S. (1 Otto) 406 (1875); *Ross v. Johns-Manville Corp.*, 766 F.2d 823 (3d Cir. 1985); *Loughan v. Firestone Tire & Rubber Co.*, 624 F.2d 726 (5th Cir. 1980); Restatement (Second) of Conflict of Laws § 142(2)(1971). Although most states have enacted borrowing statutes to address the problem presented in this case, I am not persuaded that this choice-of-law approach is mandated by the Constitution.

The majority opinion fails to cite any cases supporting its position that a forum's application of its statute of limitations may violate the due process clause of the Constitution. The two Supreme Court cases relied on by the majority, *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), and *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), address only the constitutional limits on a forum's choice of substantive

law. In *Hague*, Justice Brennan stated that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." 449 U.S. at 312-13. Moreover, the Court in *Dick* distinguished the case before it, which involved an attempt to apply Texas substantive law to a contractual limitation on the period in which the parties could sue, from a case in which the forum simply applied its procedural statute of limitations. 281 U.S. at 409-10.

In the absence of any Supreme Court decision disavowing the traditional rule permitting a state to apply its own statute of limitations,[1] I conclude that a Mississippi court's application of its six-year statute of limitations in cases such as the one before us would not violate due process. *See Cowan v. Ford Motor Co.*, 694 F.2d 104, 107 (5th Cir. 1982)(rejecting the contention that *Hague* and *Dick* limit Mississippi's selection of its statute of limitations).

Because I believe a Mississippi court could apply its statute of limitations in this case, I turn now to the issue whether the district court erred in applying Pennsylvania's statute of limitations to the Ferenses' tort claim. The parties agree that the Mississippi state courts would apply its six year statute of limitations in this case. *See Cowan v. Ford Motor Co.*, 719 F.2d 787 (5th Cir. 1983); *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 131 So. 84 (1930). They also agree that under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), the federal

[1] In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n.10 (1984), the Court refused to reach the question whether the traditional choice of law rule, permitting a forum to select its statute of limitations, was limited by the due process clause.

district court in which this case was originally filed was bound to apply Mississippi's choice-of-law rules, and hence, its statute of limitations.

In *Van Dusen v. Barrack*, 376 U.S. 612 (1964), the Supreme Court held that the law of the transferor state should be applied when a defendant moves for a transfer under section 1404(a). It based this holding on two grounds. First, it stated that its holding would prevent the defendant from using section 1404(a) as a forum-shopping device. 376 U.S. at 633-636. Second, the Court concluded that under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1934), section 1404(a) should be interpreted to "ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." 376 U.S. at 638. The *Barrack* Court explicitly reserved the question whether the same rule should apply in cases in which the plaintiff initiated the transfer. A number of courts of appeals, however, have held that the law of the transfer state should govern regardless of which party moved for transfer if the transferor court is a proper forum in terms of venue and personal jurisdiction. *See Gonzalez v. Volvo of America Corp.*, 734 F.2d 1221, 1223-24 (7th Cir. 1984); *Nelson v. International Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983); *Martin v. Stokes*, 623 F.2d 469, 471-73 (6th Cir. 1980).

By focusing on whether the transferor court was a permissible forum rather than the identity of the party seeking the transfer, the courts have prevented improper forum-shopping by denying plaintiffs the ability to obtain advantageous state law in fora in which they could not properly maintain an action. At the same time, deciding the choice of law issue on the basis of the propriety of the plaintiff's initial forum selection complies with the requirement in *Barrack*

that a transfer from a proper forum does not "achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." 376 U.S. at 638.

In this case, there is no dispute that this case could be brought in the federal district court for the southern district of Mississippi in terms of venue and personal jurisdiction over the defendant. Because *Barrack* and the *Erie* doctrine require courts to treat a transfer under such circumstances as "just a change of courtrooms," *Martin v. Stokes*, *supra*, 623 F.2d at 472, the Mississippi statute of limitations should have been applied to the Ferenses' tort action.

The district court based its decision to apply the transferee's law on the ground that plaintiffs must demonstrate some good faith intent to proceed in the court where the action was originally filed before they can obtain the advantages of the transferor's law. Because it believed that the Ferenses had no intention of proceeding in the Mississippi federal district court, the court applied Pennsylvania's statute of limitations to the tort action.

This factual inquiry into the plaintiff's motives, however, is not justified under section 1404(a). Section 1404(a) permits both plaintiffs and defendants to initiate transfers "for the convenience of the parties." Moreover, as noted above, compliance with the *Barrack* language dictates that the law of the transferor state govern when the transferor court is a permissible forum.

There may be, as the appellees urge, good reasons to prevent clever plaintiffs from taking advantage of the transfer provisions in the way the Ferenses did in this case. Whether there should be restrictions on plaintiff-initiated transfers under section 1404(a), however, is an issue that is best left to Congress.

Federal courts should not "establish and impose upon state courts a federal choice-of-law rule." *Allstate Insurance Co. v. Hague*, *supra*, 449 U.S. at 334 (Stevens, J., concurring). As a federal court sitting in diversity, the district court of the southern district of Mississippi was bound to apply Mississippi's six-year statute of limitations. To be consistent with both *Erie* and *Barrack*, the transferee court should have applied the Mississippi statute of limitations to the Ferenses' tort action. I would therefore reverse the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix D

Albert J. FERENS and Margaret L. Ferens, his wife, Plaintiffs,

v.

DEERE & COMPANY, Defendant.

Albert J. FERENS and Margaret L. Ferens, his wife, Plaintiffs,

v.

JOHN DEERE COMPANY, a/k/a Deere & Company, Defendant.

Civ. A. Nos. 85-1534, 85-2725.

United States District Court, W.D. Pennsylvania.

July 25, 1996.

Stanley V. Ostrow, William A. Pesarol, Pittsburgh, Pa., Faye Murphree James, William R. Barnett, Jackson, Miss., for plaintiffs.

Gary J. Sharlock, Sharlock, Repchock & Mahler, Pittsburgh, Pa., for defendant.

OPINION

COHILL, Chief Judge.

Presently before the Court is defendant's Motion for Summary Judgment in the above-captioned cases. Diversity jurisdiction is proper pursuant to 28 U.S.C. §1332 (1982).

Summary of Facts and Procedural History

Plaintiffs, Albert J. Ferens and Margaret L. Ferens, reside in Dunbar, Fayette County, Pennsylvania. Defendant, Deere & Co., is a Delaware corporation with its principal place of business in Moline, Illinois. Defendant Company is in the

business of manufacturing, advertising, selling and distributing combines, which are used to thresh and clean grain.

On or about July 17, 1981, Plaintiff purchased a John Deere Sidehill #9620 Combine, Serial No. 454807, which was manufactured by Defendant. Complaint, ¶4. Defendant sold the combine in question to the Uniontown Farm Equipment Company, which company thereafter sold the combine to Plaintiff for use on his farm. *Id.*, ¶6.

On or about July 5, 1982, in Washington County, Pennsylvania, while Plaintiff was cleaning the combine, his right hand was pulled into the rotating auger, thereby amputating it above the wrist. *Id.*, ¶7.

On July 3, 1985, Plaintiffs filed C.A. 85-1534 in the Western District of Pennsylvania, basing their claim on the Pennsylvania Commercial Code, 13 Pa.C.S. §§1101-9507 (Purdon 1964). Specifically, Plaintiffs alleged that the combine was expressly and/or impliedly warranted by Defendant to be merchantable and fit for the ordinary purposes for which it was used, and that Defendant breached its express and/or implied warranties since the combine was, in fact, defective.

Subsequently, on July 25, 1985, Plaintiffs filed C.A. 85-2725 in the Southern District of Mississippi, Jackson Division. That action, which was founded on the same accident whereby Plaintiff lost his right hand, sought damages which were identical to those sought in Plaintiffs' initial action; however, recovery was based on theories of negligence and strict liability under §402A and B of the Restatement (2d) of Torts. In their complaint in the subsequent action, Plaintiffs alleged that the combine was defective in and of itself, and as a result of Defendant's failure to warn of the alleged defects.

In a rather unusual procedural move, Plaintiffs then filed a motion for change of venue of the Mississippi action under 28 U.S.C. §1404(a). Plaintiffs' motion was granted on November 8, 1985 by United States Magistrate John R. Counts, III of the Southern District of Mississippi, Jackson Division, who transferred Plaintiffs' second action to the Western District of

Pennsylvania. Thereafter, by Order of this Court dated November 21, 1995, the two lawsuits were consolidated for all purposes.

Summary Judgment

Defendant has filed this Motion for Summary Judgment on the grounds that 1) the purchase order disclaimed any implied warranties of merchantability and fitness for a particular purpose, and contained an exclusion of consequential damages, and 2) Pennsylvania's two-year limitations period bars Plaintiffs' negligence and strict liability claims.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.56; *Anderson v. Liberty Lobby Inc.*, ___ U.S. ___, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The moving party has the burden of proving that no genuine issue exists, *Adickes v. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), and any doubts must be resolved in favor of the nonmoving party. *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir.1985) (quoting *Ness v. Marshall*, 660 F.2d 517, 519 (3d Cir.1981)).

The United States Supreme Court has recently stated that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses . . ." *Celotex Corp. v. Catrett*, ___ U.S. ___, 106 S.Ct. 2548, ___, 91 L.Ed.2d 265 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 106 S.Ct. at 2510.

Here, the motion is made by the Defendant solely on the basis of the pleadings without supporting affidavits; thus, the motion is functionally equivalent to a motion for judgment on

the pleadings under Fed.R.Civ.P. 12(c). *Schwartz v. Compagnie General Transatlantique*, 405 F.2d 270, 273 (2d Cir.1968), quoting 6 J. MOORE, MOORE'S FEDERAL PRACTICE, ¶56.02[3], at 2035. As such, all well-pleaded factual allegations of the Plaintiffs must be taken as true and all allegations of the moving party which have been denied are taken as false; conclusions of law are not deemed admitted. *Shade v. Commonwealth of Pennsylvania Dept. of Transportation*, 394 F.Supp. 1237, 1243 (M.D.Pa.1975).

1. *Disclaimer of Warranties*

Defendant claims that the purchase order conspicuously included the warranties which accompanied the sale of the combine and that it disclaimed the implied warranties of merchantability and fitness for particular purpose. In addition, Defendant emphasizes that said purchase order contained a clause excluding consequential damages. Defendant's Answer, Exhibit "A."

Plaintiffs admitted to the authenticity of the purchase order in their Reply to Defendant's Answer; however, Plaintiffs contend that the terms of the purchase order are unconscionable, amount to a contract of adhesion and are against public policy.

Under its adoption of the Uniform Commercial Code, 13 Pa.C.S. §2316 provides that warranties may be excluded or modified at the time of sale:

> §2316. Exclusion or modification of warranties
>
> . . . .
>
> (b) Implied warranties of merchantability and fitness.—Subject to subsection (c), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify an implied warranty of fitness the exclusion must be by a writing and conspicuous. . . .
>
> (c) Implied warranties in general.—Notwithstanding subsection (b)

(1) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which is common understanding calls the attention of the buyer to the exclusion of warranties and makes plain that there is no implied warranty.

(2) When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.

(3) An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

. . . . .

Id. *See Thermo King Corp. v. Strick Corp.*, 407 F.Supp. 75 (W.D.Pa.), *aff'd.*, 600 F.2d 503 (3rd Cir.1979) (manufacturer's warranty card contained "conspicuous" language to exclude implied warranties).

In the present case, the purchase order provided as follows:

> The Warranty on the reverse side is a part of this contract and the following applies where permitted by law: Neither seller, John Deere Company, nor the manufacturer makes any other representations or warranties, express or implied (AND EXPRESSLY DISCLAIMS THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS) or has any obligation to the Purchaser except as provided on the reverse side.

Defendant's Answer, Exhibit "A."

On the reverse side of this purchase order, in paragraph F, the disclaimer is again set forth:

> F. NO REPRESENTATION OR IMPLIED WARRANTY.
>
> Where permitted by law, neither John Deere nor any company affiliated with it makes any warranties, representations or promises, express or implied, as to the quality or performance of its products other than those set forth above and DOES NOT MAKE ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS.

Id.

Paragraph G on the reverse side added:

> G. REMEDIES EXCLUSIVE.
>
> The only remedies the purchaser has in connection with the breach or performance of any warranty on John Deere equipment are those set forth above. In no event will the dealer, John Deere or any company affiliated with John Deere be liable for incidental or consequential damages or injuries, including, but not limited to loss of crops, loss of profits, rental or substitute equipment or other commercial loss.

In its definition of consequential damages, 13 Pa. C.S. §2715(b)(2) provides:

> (b) Consequential damages.—Consequential damages resulting from the breach of the seller include:
>
> (2) injury to person or property proximately resulting from any breach of warranty.

Id.

Plaintiffs, in support of their argument that the disclaimer of warranties and exclusion of remedies provisions are unconscionable, rely on 13 Pa.C.S. §2719(c):

> (c) Limitation of consequential damages.—Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer

goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Id.

Whether a contract or clause is unconscionable is a question of law for the court. *Bishop v. Washington*, 331 Pa.Super. 397, 399, 480 A.2d 1088, 1094 (1984). The relevant section on unconscionability, 13 Pa. C.S. §2302, provides:

§2302. Unconscionable contract or clause

(a) Finding and authority of court.—If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may:

(1) refuse to enforce the contract,

(2) enforce the remainder of the contract without the unconscionable clause, or

(3) so limit the application of any unconscionable clause as to avoid any unconscionable result.

(b) Evidence by parties—When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Plaintiffs argue that the above language renders Defendant's motion premature since the parties have not presented evidence on the issue of unconscionability. We agree for the following reasons.

The Pennsylvania Supreme Court has adopted the following definition of unconscionability:

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.

Witmer v. Exxon Corp., 495 Pa. 540, 551, 434 A.2d 1222, 1228 (1981), quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C.Cir.1965). In the *Williams* case, Judge Skelly Wright summarized the factors to be considered in determining whether a contract or clause is unconscionable or not:

> Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.
>
> In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case."

Williams, 350 F.2d at 449-450 (footnote omitted).

In the present case, since no affidavits, interrogatories, depositions, or evidence of any sort has been submitted regarding the circumstances surrounding the transaction, we can only speculate as to whether or not the purchase order was unconscionable. Following the mandate of 13 Pa.C.S. §2302(b), we find it necessary to afford the parties a reasonable opportunity to present evidence on the "commercial setting, purpose and effect" of the disputed language in the purchase order. We note that while Plaintiff is a farmer, that alone is not indicative of his commercial standing because he may be a "small-time" farmer or he may be a large corporate farmer with thousands of acres of land. *See Purvin v. Consolidated Energy Products Co.*, 674 F.2d 217, 224 (4th Cir.1982) (Hall, J., dissenting) ("while in its broadest sense the meaning of 'commercial' could include any activity intended to yield a profit, in common parlance the term is generally associated with manufacturing or retail activities").

Once we are presented with some evidence as to whether the transaction was of a commercial or consumer nature, prior dealings between the parties, customary practice within the industry etc., we will then be able to make a determination on the issue of unconscionability. As it currently exists, however, the record is barren on that matter. Thus, Defendant's reliance on *Beckman v. Vansail-Dillworth Lincoln Mercury, Inc.*, 321 Pa.Super. 428, 468 A.2d 794 (1983) for the proposition that summary judgment should be granted is misplaced, as there, the state court had the benefit of affidavits, deposition testimony and other evidence which enabled it to render a decision that the contract clause was not unconscionable. *Id.* at 430-40, 468 A.2d at 795.

Defendant also relies on *Thermo King Corp.*, *supra*, where this Court found a similar warranty exclusion and limitation of remedy provision not to be unconscionable. However, *Thermo King* is not dispositive of this case because it indubitably involved a commercial transaction between two corporate parties. *Id.*, at 78. Moreover, unlike the situation in the case before us which involves injury to the person, *Thermo King* only involved consequential damages for the loss of $15,000 worth of cargo. *Id.* at 77. While the applicable provisions of the purchase

order here would most likely bar a claim for the loss of crops or profits resulting from a defective blade in the combine, we are not convinced that Plaintiff understood those provisions as limiting his right to bring a breach of warranty action for the loss of his hand. *Cf. Keystone Aeronautics Corp. v. R.J. Enstrom Corp.*, 499 F.2d 146 (3d Cir.1974) (contract clause must clearly and unequivocally express intent necessary to exculpate defendant from negligence or strict liability claims).

Accordingly, we will deny Defendant's Motion for Summary Judgment on Plaintiff's breach of warranty claim without prejudice. Defendant may reassert said motion, if deemed necessary, once the record becomes fully developed as set forth above. *See Webb v. Ford Motor Co.*, 76 F.R.D. 452, 456 (W.D.Pa.1977) (motion for summary judgment denied with respect to counts alleging unconscionability of dealer development arrangement since further discovery was necessary relative to motive and intent).

II. *Applicable Statute of Limitation for Plaintiffs' Tort Claims*

Our inquiry now turns to what statute of limitations governs Plaintiffs' negligence and strict liability claims. At the outset, we note that Pennsylvania has a two-year statute of limitations for injuries to the person, 42 Pa.C.S. §5524(2) (Purdon 1981), whereas Mississippi's limitation period is six years. Miss.Code Ann. §15-1-49 (1972).

As we noted earlier, Plaintiffs' tort actions were originally filed in the Southern District of Mississippi *after* Plaintiffs initiated their UCC breach of warranty claims in the Western District of Pennsylvania. Plaintiffs then transferred their tort actions from the Southern District of Mississippi to this Court pursuant to 28 U.S.C. §1404(a) which provides:

> For the convenience of the parties and witnesses, in the interest of justice, a District Court may transfer any civil action to any other district or division where it might have been brought.

Id.

In support of the transfer, Plaintiffs stressed the feasibility of consolidating their tort claims with their pending UCC claims in this District Court and raised concerns about the inconvenience and expense that would result if their second action remained in the Southern District of Mississippi. In his Affidavit In Support of Motion for Change of Venue, Albert J. Ferens admitted that:

> 6. The action against defendant, Deere & Company, in the Western District of Pennsylvania arises out of said accident which occurred on July 5, 1992, and is based on provisions of the Uniform Commercial Code.
>
> 7. The basis of the action filed against Defendant in the Southern District of Mississippi was the aforesaid July 5, 1992 accident and is based on strict liability, negligence and breach of warranty by said defendant.
>
> 8. That all witnesses with any knowledge of the accident or injuries husband-plaintiff sustained, including doctors, hospital personnel and who plaintiffs will call and use, reside in the Western District of Pennsylvania.
>
> 9. That all documents relating to the personal injuries plaintiff sustained are located in the Western District of Pennsylvania.
>
> 10. That to simultaneously pursue the Pennsylvania and Mississippi actions as separate lawsuits would be a great cost and expense to him.

Id., ¶¶6-10.

In the instant case, both parties concede that statutes of limitations are procedural and that the applicable limitation period is to be provided by the law of the forum. *See Butler v. Dravo Corp.*, 310 F.Supp. 1265 (W.D.Pa.1970); *Vick v. Cochran*, 316 So.2d 242 (Miss.1975). To prevent forum shopping and to keep lawsuits in forums which have a significant nexus and a legitimate interest in the litigation, most jurisdictions, including Pennsylvania and Mississippi, have adopted "borrowing statutes." In essence, borrowing statutes adopt as the

applicable period of limitation the statute which would have applied in the jurisdiction where the claim arose. For instance, Pennsylvania's borrowing statute provides that:

> The period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, which ever first bars the claim.

42 Pa.C.S. §5521.

However, the crux of the problem in the instant case stems from Mississippi's anomalous borrowing statute which provides:

> When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country, or of some other state and country *where the defendant has resided before he resided in this state*, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.

Miss.Code Ann. §15-1-65 (1972) (emphasis added). The Mississippi Supreme Court, relying on the highlighted language above, has held that this borrowing statute "only applies where a nonresident in whose favor the statute has accrued afterward moves into this state." *Louisiana & Mississippi R. Transfer Co. v. Long*, 150 Miss. 654, 131 So. 84, 88 (1930). *See also Cowen v. Ford Motor Co.*, 719 F.2d 785 (5th Cir.1983) (applied Mississippi Supreme Court's interpretation of that state's borrowing statute). Since Defendant was registered to do business in Mississippi at the time of the accident here, Defendant would be treated as a resident under Mississippi law. *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009, 1011 (5th Cir.1969). Relying on Mississippi's borrowing statute, Plaintiffs contend that the 6-year limitation of that forum should be applied.

We now reach the threshold question of whether the law of the transferor forum or the transferee forum should be applied. In resolving this question, we must consider whether Plaintiffs can utilize the change of venue provisions of 28 U.S.C. §1404(a) to resurrect a time-barred claim in the more convenient forum

In *Van Dusen v. Barrack*, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964), the Supreme Court held that "where defendants seek transfer, the transferee district court must be obligated to apply the state law that would have applied if there had been no change of venue." *Id.* at 638, 84 S.Ct. at 821, 11 L.Ed. at 962. The *Van Dusen* Court pointed out that "both the history and purpose of §1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of court rooms." *Id.* at 636, 84 at 810, 11 L.Ed.2d at 916. The Court stressed that §1404(a) should not be used as a device by defendants to undermine the plaintiff's privilege of selecting "a forum which, although it was inconvenient, was a proper venue." *Id.* at 634, 84 S.Ct. 1815, 11 L.Ed.2d at 980. Moreover, the Court noted that if a change of law were concomitant with transfer, §1404(a) would become a forum shopping mechanism. *Id.* at 636, 84 S.Ct. at 819, 11 L.Ed.2d at 961. While *Van Dusen* concluded that a change of venue should normally be considered no more than a change of court rooms, the Court qualified its holding by continuing:

> In so ruling, however, we do not and need not consider whether in all cases §1404(a) would require the application of the law of the transferor, as opposed to the transferee, state. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under §1404(a)
>
> . . . . .

Id. at 639-640, 84 S.Ct. at 821, 11 L.Ed. at 963.

As of this moment, the Supreme court has not ruled on the issue left unanswered by *Van Dusen*, and our research has not found any controlling authority in the Court of Appeals for the Third Circuit. However, it has been suggested that a logical interpretation of the question left unanswered by *Van Dusen* is that when a plaintiff moves to transfer, the law of the transferee

state should apply, otherwise plaintiffs, as opposed to defendants, would be free to shop for inconvenient forums with longer limitation periods. *See* C. WRIGHT, LAW OF FEDERAL COURTS, §44 at 261-62 n. 35 (West 4th Ed.1983); ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969). *But see*, Note, *Choice of Law In Federal Court After Transfer of Venue*, 63 CORNELL L.REV. 149, 157-58 (1977). The reasoning behind the ALI view is that it will prevent plaintiffs from using transfers to carry favorable law from one forum to another. This rationale has been followed by courts in analogous situations. *Cf. Carson v. U-Haul Co.*, 434 F.2d 916 (6th Cir.1970) (plaintiff moved to transfer to forum with longer statute of limitations; defendant not amenable to process in original forum); *Parham v. Edwards*, 346 F.Supp. 908 (S.D. Ga.1972) (justice did not require transfer from original forum, with favorable limitation period to plaintiffs but no personal jurisdiction over defendants, to forum in which service had been obtained in a similar action, but where the action was barred by the limitation period); *Mate v. Budd Co.*, 44 F.R.D. 225 (E.D.Pa.1968) (plaintiff filed lawsuit in forum where statute of limitations barred action and sought to transfer to forum with favorable limitation period); Annot., 7 A.L.R.Fed. at 27-28 (1971).

Plaintiffs argue that the law of the transferee state applies only when personal jurisdiction with the defendant is lacking or venue is improper, neither of which was contested here. *See, e.g., Gonzales v. Volvo of America Corp.*, 734 F.2d 1221, 1223-24 (7th Cir.1984) (law of forum selected by plaintiff should govern regardless of which party initiates transfer to another district); *Martin v. Stokes*, 623 F.2d 460, 471 (6th Cir.1980) (same). *See also Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir.1980) (similar facts, law of transferee state applied where defendant initiated transfer). However, in *Gonzales*, the court held that plaintiffs are "not permitted to capture favorable law of forums which lack personal jurisdiction over the defendant by filing suit there and then transferring the action to a state that is able to assert personal jurisdiction." *Id.* at 1224. By analogy, we believe that this reasoning should apply to the facts

before us since plaintiffs could not have originally brought their second action in the forum where it has been transferred due to the applicable limitations period. We reiterate that §1404(a) only permits the transfer of an action to a "district or division where it might have been brought." 28 U.S.C. §1404(a) (emphasis added.)

We believe that, at the very least, some measure of good faith expectation of proceeding in the court in which the complaint is filed is essential to allow Plaintiffs to avail themselves of that forum's limitation period, and the filing of a complaint which is merely a procedural ploy will not suffice. *Cf. Riley v. Kansas City Life Insurance Co.*, 620 F.2d 1250, 1254 (5th Cir.1980) (filing of complaint in transferor state was merely a procedural ploy and did not commence action for purposes of tolling the limitation period).

The fact that Plaintiffs' original lawsuit in this District Court did not include the claims which were time-barred under Pennsylvania law unequivocally establishes that Plaintiffs were seeking to maneuver around this by intentionally filing a second action in an inconvenient forum to avail themselves of that forum's longer statute of limitations and its plaintiff-oriented borrowing statute. By filing a subsequent lawsuit in the Southern District of Mississippi to take advantage of that state's six-year limitation period and then moving to transfer that action with their pending action in this District Court for purposes of convenience, consolidation and efficiency, Plaintiffs are seeking the "best of both forums." While we acknowledge the strong presumption in favor of a plaintiff's choice of forum, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055, 1062 (1947), where a plaintiff chooses a forum which is not his home forum, his choice should be given considerably less weight. *Jordan v. Delaware & Hudson Ry. Co.*, 580 F.Supp. 907, 908 (E.D.Pa.1984). This consideration becomes especially relevant here since the matters relied on by Plaintiffs in support of their transfer were known to them well before they instituted their second lawsuit.

We believe that Plaintiff's tactics in this case amount to a judicial juggling act between forums—one with a clear interest

in the litigation and one whose interest is nominal at best. The only nexus between Plaintiffs' claims and Mississippi is that the Defendant Company is registered to conduct business there, has a designated agent for service of process in that state and actually transacts some business in Mississippi. On the other hand, Plaintiffs are residents of Pennsylvania, and the claim arose in Pennsylvania directly as a result of Defendant's having conducted business within that state. Regarding the choice of law issue, even under the "center of gravity" test adopted in *Mitchell v. Craft*, 211 So.2d 500 (Miss.1968), we find that Pennsylvania substantive law would govern this dispute.

Implicit in the holding of *Van Dusen* is the rationale that §1404(a) is simply a judicial housekeeping device to assure convenience and fairness to the parties. Further, we are mindful that a transfer under §1404(a) must be "in the interest of justice." Therefore, under the facts of this case, we refuse to allow Plaintiffs to transform §1404(a) into a device which would enable them to forum shop for a favorable limitation period. *Kaiser v. Mayo Clinic*, 280 F.Supp. 900, 907 (D.Minn.1968). Since Plaintiffs were fully aware of all the relevant facts at the time they commenced both actions, including the fact that the Southern District of Mississippi was an inconvenient forum, the " 'interest of justice' would be thwarted rather than served if this Court permitted this type of 'legal footwork'." *Matta*, 44 F.R.D. at 226-27 (citations omitted).

Accordingly, Defendant's motion for summary judgment is granted as to Plaintiffs' tort claims which are barred by the limitation period of 42 Pa.C.S. §5524(2).

Appendix E

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 86-3595

ALBERT J. FERENS and MARGARET L. FERENS,
his wife
vs.
DEERE & COMPANY
(D.C. Civil No. 85-1534)

ALBERT J. FERENS and MARGARET L. FERENS,
his wife
vs.
JOHN DEERE COMPANY,
a/k/a DEERE & COMPANY
(D.C. Civil No. 85-2725)

ALBERT J. FERENS, and MARGARET L. FERENS,
his wife,
Appellants

(D.C. Civil No. 85-1534 & 85-2725)

On Appeal From the United States District Court
For the Western District of Pennsylvania

Present: GIBBONS, *Chief Judge*, SEITZ and
ALDISERT, *Circuit Judges*

JUDGMENT ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted on remand from the Supreme Court of the United States on August 8, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 5, 1986, be, and the same is hereby affirmed. Costs taxed against the appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ SALLY MEYOS
Clerk

November 25, 1988

Appendix F

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 86-3595

ALBERT J. FERENS and
MARGARET L. FERENS, his wife

Appellants

vs.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY

Appellee

Sur Petition for Rehearing

Present: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and ALDISERT,* *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ JOHN J. GIBBONS
Chief Judge

Dated: January 5, 1989

* As to panel rehearing only.